COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

MOUNTAIN STREET, LLC, Appellant	)	
v.	)	No. 04-01
SHARON BOARD OF APPEALS, Appellee	)	

RULING ON MOTION TO INTERVENE

This appeal concerns affordable housing proposed for 230 acres of land located on Mountain Street in Sharon, Massachusetts. The developer applied to the Sharon Board of Appeals under G.L. c. 40B, §§20-23, to build 250 units of ownership housing. The Board granted a comprehensive permit with conditions, which was appealed by the developer, Mountain Street, LLC. Several preliminary motions were filed, and a ruling on them was issued on September 24, 2004.

In addition to the preliminary motions, two abutters have filed a Motion to Intervene. The motion requests intervention by Ms. Leslie Myatt and Ms. Sue Kerr pursuant to our regulations, 760 CMR 30.04(2), "on the grounds that a ruling by the Housing Appeals Committee favorable to the Applicant would adversely affect [the proposed] Interveners [sic] and would impair and impede their recognizable real property interests." Motion, p. 1 (filed January 22, 2004). The supporting memorandum alleges that the proposed project "has the

potential to impact the [proposed] interveners' [sic] property, including threats to health and safety from flooding, stormwater runoff, noise, light trespass, property devaluation and natural resource destruction." Memorandum, p. 2 (filed Jul. 20, 2004).

A second motion, brought by eleven individuals,[1] seeks intervention pursuant to G.L. c. 30A, § 10A to address possible "damage to the environment" (as that term is defined in G.L. c. 214, 214, § 7A). In response Mountain Street filed an opposition, and the proposed interveners filed a reply.[2]

INTERVENTION PURSUANT TO 760 CMR 30.04(2)

An administrative agency has broad discretion to grant or deny intervention. *Tofias v. Energy Facilities Siting Board*, 435 Mass. 340, 346, 757 N.E.2d 1104, 1109 (2001). It is not required to allow intervention by petitioners who have not demonstrated a sufficient interest in the proceedings. See *Newton v. Dept. of Public Utilities,* 339 Mass. 535, 543 n.6, 160 N.E.2d 108, 113 (1959). Conversely, it may allow people who are not substantially and specifically affected to participate in proceedings for limited purposes, and such participation may even be extensive if there are special circumstances to provide justification. See *Boston Edison Co. v. Dept. of Public Utilities*, 375 Mass. 1, 45-46, 375 N.E.2d 305, 332, cert. den. 439 U.S. 921 (1978).

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1. The proposed interveners are Sean Tierney, Pam Tierney, Catherine Reed, Barry Reed, Richard Mandell, Arlyne Mandell, Leslie Koval, Steven Koval, Rita Corey, Norman Corey, and Sue Kerr.

2. Although the Proposed Interveners' Reply is much longer than the original memorandum of support, the arguments presented are the same. It should be noted that although the Committee's hearings are formal adjudicatory proceedings, it is not a court and therefore the Massachusetts Rules of Civil Procedure do not apply.

Our standards for intervention set out in 760 CMR 30.04, and require a "showing that [the intervener] may be substantially and specifically affected by the proceedings...."[3] As is clear from the commentary in the regulation, this means showing "that their harm would be related to the granting of relief from local regulation as requested by the developer in this appeal, that their harm is not a common harm which is shared by the all the residents of the Town, and that the Board will not diligently represent those interests." *Weston Development Group v. Hopkinton*, No. 00-05, slip op. at 6-7 (Mass. Housing Appeals Committee May 26, 2004). In addition, the harm stated must not be speculative. See *Tofias v. Energy Facilities Siting Board*, 435 Mass. 340, 348, 757 N.E.2d 1104, 1110 (2001).

The only allegations in the abutters' motion and memorandum are that the proposed housing "has the potential to impact the real property of Ms. Myatt and Ms. Kerr, including threats to health and safety form flooding, stormwater runoff, noise, light trespass, property devaluation and natural resource destruction." This provides no factual specificity as to how

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3. Our standards are similar to and reflect the requirements of the state Administrative Procedures Act, c. 30A, § 10. They are also very similar to the standing requirements applied by the courts. Although as an administrative agency, our discretion is presumably sufficiently wide so that we could apply our intervention standards more liberally than the courts do the standing requirements, we have always—largely for the sake of consistency and clarity—attempted to apply our standards so as to be identical to the courts' standing requirements. (The same standing requirements apply to both zoning appeals under G.L. c. 40A and comprehensive permit appeals under G.L. c. 40B. *Bell v. Zoning Board of Appeals of Gloucester*, 429 Mass. 551, 553, 709 N.E.2d 815, 817 (1999).) Of course, procedurally, in the courts abutters have the benefit of the rebuttable presumption established under G.L. c. 40A, § 11; this is not available to them under our regulations.

In cases in which the abutters do not satisfy our standards for intervention, we will typically permit them to participate in our hearings on a limited basis as "interested persons." See 760 CMR 30.04(4). Although participation by interested persons has been permitted by our regulations for many years, in the past abutters were often permitted to participate fully as "amici" with only the most cursory review of their actual interests in the controversy. We amended § 30.04 and other procedural portions of our regulations effective July 2, 2004. Our intention is to be clearer and more precise during the early stages of the hearing process in delineating the rights of interveners and interested persons. Interveners will be permitted to participate fully, but their participation will

they will be affected.[4] The remainder of the five-page memorandum asserts three esoteric arguments dealing primarily with the procedures or standards under which the Board considered the application. These, however, are not matters that specifically affect the abutters.

First, the proposed interveners "challenge the Board's acceptance of the project eligibility letter... pursuant to 760 CMR 31.01(1)." This jurisdictional matter clearly is not of specific concern to individual residents of the town. Second, they argue that Board failed to examine the projects finances and establish an acceptable profit limitation. Even the Board's consideration of these matters should be very limited since they are primarily within the province of the subsidizing agency. *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 7 (Mass. Housing Appeals Committee Jun. 25, 1992); also see *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass 339, 379, 294 N.E.2d 393, 420-421 (1973). But in any case, they are not of specific concern to the abutters. Third, they argue that the Board "failed to require the Applicant to provide proof of regional need, if any, for low and moderate-income housing." This, too, is not a specific concern of the abutter, and in fact in most cases it is not necessary for the Board to make a specific finding with regard to regional housing need since "the municipality's failure to meet its minimum housing obligations, as defined in §20, will provided compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal." *Id.*, at 366, 413.

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normally be limited to those issues that affect them specifically; interested persons will be limited further.

4. Even if specific facts were alleged, concerns about noise and light trespass might well be dismissed as aesthetic sensitivity insufficient to support intervention in the absence of an allegation that such matters are regulated under the Sharon zoning bylaw. See *Monks v. Zoning Board of Appeals of Plymouth*, 37 Mass.App.Ct. 685, 688, 642 N.E.2d 314, 315 (1994).

Ms. Myatt and Ms. Kerr have failed to demonstrate that they are likely to be substantially and specifically affected by these proceedings, and their motion to intervene is therefore denied. I will allow them to participate in the hearing on a limited basis as interested persons. See 760 CMR 30.04(4). Either they or their counsel may make a statement at beginning of the evidentiary portion of the hearing, and they may file a brief at the close of testimony.

INTERVENTION PURSUANT TO G.L. c. 30A, § 10A

The motion also includes a request to intervene by eleven people pursuant to G.L. c. 30A, § 10A. That section of the Administrative Procedures Act permits not less than ten persons to intervene in an adjudicatory proceeding in which damage to the environment, as defined in G.L. c. 214, § 7A, might be at issue. I am not convinced that an appeal before the Housing Appeals Committee—where intervention rights are already established by 760 CMR 30.04—is the sort of proceeding for which nearly automatic intervention contemplated by G.L. c. 30A, § 10A is appropriate.[5] And in any case, the purpose of such intervention is "in order that any decision… shall include the disposition of [the] issue [of damage to the

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5. There appear to be no reported precedents interpreting G.L. c. 30A, § 10A that can be of assistance. It is fair to assume, however, that the policy considerations underlying the similar provisions of G.L. c. 214, § 7A are instructive. Initially, the Supreme Judicial Court interpreted that statute broadly. See *Boston v. Massachusetts Port Auth.*, 364 Mass. 639, 646, 308 N.E.2d 488, 494 (1974). But the Court's more recent interpretation of the law has been increasingly narrow. See *Town of Warren v. Hazardous Waste Facility Site Safety Council*, 392 Mass. 107, 466 N.E.2d 102 (1984); *Cummings v. Secretary of the Executive office of Environmental Affairs*, 402 Mass. 611; 524 N.E.2d 836 (1988); *Town of Wellfleet v. Glaze*, 403 Mass. 79, 525 N.E.2d 1298 (1988); *Town of Walpole v. Secretary of the Executive Office of Environmental Affairs*, 405 Mass. 67, 537 N.E.2d 1244 (1989); also see *Enos v. Secretary of the Executive Office of Environmental Affairs*, 48 Mass.App.Ct. 239, 247 n.13, 719 N.E.2d 874, 880 n.13 (1999), aff'd 432 Mass. 132, 731 N.E.2d 525; also see *Enos v. Secretary of the Executive Office of Environmental Affairs*, 432 Mass. 132,

environment and the elimination or reduction thereof]." G.L. c. 30A, § 10A. Full intervention by these persons is unnecessary for two reasons.

First, in appeals under the Comprehensive Permit Law, some of the issues typically joined between the parties—the developer and the Board—are environmental issues. Thus, the purpose of § 10A is served in that our hearing process includes the disposition of issues of damage to the environment. In this case, because of the nature of the motion to intervene and it generality (see below) it is difficult to ascertain exactly what damage to the environment is feared, but there is no reason to believe that it the Board will not adequately protect these environmental issues as it presents its case to us.

Second, there was no memorandum in support of this motion and nowhere do these individuals allege environmental damage with any specificity. The statutory provision under which they would proceed provides that "damage to the environment shall not include any insignificant… impairment…." G.L. c. 214A, § 7A, para. 1.

Within the context of the Comprehensive Permit Law, the proposed interveners have not alleged environmental damage sufficient to support their motion, and it is therefore denied.

I will allow the eleven persons to participate in the hearing on a limited basis as interested persons. See 760 CMR 30.04(4). If they are able, at or before the Pre-Hearing Conference to be held in this matter, to articulate specific, likely, and significant impairments to the environment that have not otherwise been raised in this proceeding by the parties, they will be permitted to introduce documentary evidence and testimony (subject to cross

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141-142, 731 N.E.2d 525, 532-533 (2000). I believe that my ruling is consistent with these precedents.

examination) on those issues; they will not be permitted to cross examine the witnesses presented by the parties. If they are unable to articulate likely environmental damage with sufficient specificity, they will nevertheless be permitted to make a statement, individually or through counsel, at the beginning of the evidentiary portion of the hearing and to file a brief at the close of testimony.

Housing Appeals Committee

Date: October 20, 2004

Werner Lohe, Chairman
Presiding Officer

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